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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 89A01-0611-CR-508
	)	
DAMON LEWIS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D01-0602-FA-2

September 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State appeals the order granting the trial court's motion to correct error, in which it vacated Damon Lewis's convictions and habitual substance offender finding and ordered a new trial. We affirm.

Issue

The issue is whether the trial court abused its discretion in ordering a new trial.

Facts and Procedural History

The State charged Lewis with class A felony dealing cocaine, class D felony maintaining a common nuisance, and with being a habitual substance offender. A jury trial was held on September 24, 2006. During voir dire, the trial court asked the prospective jurors if any of them knew of any of the officers who would be testifying as witnesses in the present case. Tr. at 13. Several jurors, including Sarah Orcutt, responded in the affirmative. Orcutt stated that she knew Officer William Shake and Officer James Rice of the Richmond Police Department, who were both expected to testify. *Id*. at 13-14. After the court's initial questions, twelve prospective jurors were brought into the jury box while others, including Orcutt, waited in the back of the courtroom. After the first phase of voir dire, five prospective jurors were excused, and four more took their places, including Orcutt.

During the third round of voir dire, Orcutt disclosed that her ex-husband had been involved in the criminal justice system and that he had been treated fairly. *Id*. at 56. Ultimately, Orcutt was seated and sworn as a juror. During a pretrial recess, the trial court was advised that Orcutt was the daughter of Officer Bradley Berner, a current member of the Richmond Police Department. Lewis's counsel asked that Orcutt be excused from the panel

or that the court should permit additional questioning of Orcutt. *Id*. at 109. The State objected to that request, and the trial court sustained the objection. The trial court stated that it would not permit further questions of a juror who had already been seated. *Id*. The jury found Lewis guilty of class A felony dealing in cocaine and class D felony maintaining a common nuisance.

The trial then moved into the habitual substance offender phase. The State offered into evidence the charging information and probable cause affidavit from Lewis's 1997 conviction of dealing in cocaine, which was signed by Officer Berner. Lewis did not object. During a recess, Lewis's counsel advised the court that Orcutt's father, Officer Berner, was the head of the drug task force in 1996. Lewis's counsel was concerned that Orcutt, the jury foreperson, would share the knowledge that she gained from her father's involvement in Lewis's prior conviction with other jurors. *Id*. at 398. Lewis's counsel asked the court to dismiss the jury panel. The court denied Lewis's request, stating that the voir dire process was fair and that Lewis had waived the issue by not raising it until the habitual substance offender proceeding. *Id*. at 401. The jury found Lewis to be a habitual substance offender.

On October 9, 2006, the trial court filed its own motion to correct error, alleging a due process violation by Orcutt's inclusion as a member of the jury panel. The State filed a response in opposition to the court's motion, to which it attached sundry discovery response notices that had been provided to both the court and Lewis. Included in those exhibits were the documents signed by Officer Berner, which the State used to support the habitual substance offender finding.

On October 24, 2006, the trial court granted its motion to correct error, vacating the convictions and the habitual substance offender finding and ordering a new trial. In its order, the trial court stated that Lewis was not afforded due process of law. Appellant's App. at 93. The court found that the State did not disclose that its first exhibit to be offered at the habitual substance offender phase would be the information charging Lewis in 1996 with two counts of dealing in cocaine, sworn to as affiant by Orcutt's father, Officer Berner. *Id*. at 94. The court was convinced that Lewis's due process rights were violated and stated that it was the court's responsibility to ensure a fair trial. *Id*. at 98. The State now appeals.

Discussion and Decision

The State alleges that the trial court erred in ordering a new trial. A trial court has wide discretion to correct errors and to grant new trials. *State v. Johnson*, 714 N.E.2d 1209, 1212 (Ind. Ct. App. 1999). "An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom." *Id*.

The State asserts that the trial court abused its discretion when it granted a motion to correct error based upon its belief that the State had not informed the court or Lewis of Officer Berner's involvement with Lewis's 1997 conviction. The State correctly points out that it provided various discovery documents to Lewis, including the charging information and probable cause affidavit from Lewis's 1997 conviction, which were signed by Officer

Berner. As such, both Lewis and the trial court should have been aware of Officer Berner's involvement with the case prior to trial and the habitual offender proceeding.[1]

The State alleges that Orcutt's presence on the jury was not improper and that her relationship with a police officer does not excuse her from jury service. The State cites *Curtin v. State* for the proposition that "[t]he mere fact that a prospective juror is related to or associated with members of the law enforcement community does not constitute cause for disqualification." 903 A.2d 922, 930 (Md. 2006).

"The purpose of voir dire is to determine whether a prospective juror can render a fair and impartial verdict in accordance with the law and the evidence. A trial court has broad discretion in controlling the voir dire of prospective jurors." *Black v. State*, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005), *trans. denied*. "A biased juror must be removed, for Art. 1, § 13 of the Indiana Constitution guarantees an impartial jury." *Threats v. State*, 582 N.E.2d 396, 398 (Ind. Ct. App. 1991). Here, the parties' failure to establish during voir dire that Orcutt was related to Officer Berner, and the trial court's refusal to allow further questioning of Orcutt once that information came to light, prevented all concerned from determining whether Orcutt could render a fair and impartial verdict. Under these circumstances, we cannot conclude that the trial court abused its discretion in ordering a new trial.

[1] During voir dire, Lewis's counsel noted that comments directed at the prospective jurors in the jury box applied to the prospective jurors who were seated in the back of the room. Tr. at 31. At that time, Orcutt was in the back of the room. Orcutt had no duty to volunteer an answer to a question that she had not been asked.

Affirmed.

FRIEDLANDER, J., concurs.

BAKER, C. J., dissents with opinion.

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vs.	)	No. 89A01-0611-CR-508
	)	
DAMON LEWIS,	)	
	)	
Appellee-Defendant.	)	

BAKER, Chief Judge, dissenting.

"It has been held repeatedly that a defendant is not entitled to a perfect trial, but is entitled to a fair trial, free of errors so egregious that they, in all probability, caused the conviction." Averhart v. State, 614 N.E.2d 924, 929 (Ind. 1993). I respectfully disagree with the majority's conclusion that the fact that Orcutt's relationship to Officer Berner did not come to light during voir dire is so egregious that it warrants remanding for a new trial.

As the majority aptly observes, "both Lewis and the trial court should have been aware of Officer Berner's involvement with the case prior to trial and the habitual offender proceeding." Slip op. p. 5. Furthermore, "Orcutt had no duty to volunteer an

answer to a question that she had not been asked." Id. at n.1. Having chosen not to question the potential jurors about their relationships to law enforcement officers during voir dire when it was readily apparent from discovery documents that the identities of certain officers would be relevant during the habitual offender proceeding, Lewis should not be permitted to take a second bite of the apple with a second trial.

Concededly, Orcutt's presence on the jury was not ideal. But I do not believe that this error—if it can be called an error—was so egregious that it caused the convictions. At the most, it was relevant only during the habitual offender proceeding, inasmuch as Officer Berner had no involvement whatsoever with the underlying charges. Consequently, I would reverse the trial court's order awarding Orcutt a new trial.